

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANNA MARIE MORRISON ,
Plaintiff,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
Defendant.

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No. 05-CV-2744

MEMORANDUM

GREEN, S.J.

August 31, 2006

Presently before the court are the parties' cross-motions for summary judgment. Oral argument on the motions was held and the argument of counsel heard and considered. For the reasons set forth below, Plaintiff's Motion for Summary Judgment will be granted and Defendant's Motion for Summary Judgment will be denied.

I. BACKGROUND

Plaintiff was born on March 22, 1963. She has a prior work history including former employment as a cashier, telephone solicitor, medical assistant, medical bill collector, waitress, beautician and dancer. Plaintiff applied for disability insurance benefits and supplemental security income in April 2004. At the time of her application, she originally claimed that her disability onset date was May 1, 2002. She subsequently amended her disability onset date to March 26, 2004. Plaintiff alleged disability due to bipolar disorder and other mental conditions. The state agency denied Plaintiff's claim in August 2004. Plaintiff appealed the denial and an administrative law judge ("ALJ") held a hearing on December 14, 2004. At the hearing Plaintiff was represented by counsel, testified; and a vocational expert ("VE") - called by the Administrative Law Judge - also testified.

On February 1, 2005, the ALJ determined that Plaintiff: (1) had not engaged in substantial gainful activity since the alleged onset date of her disability; (2) has a bipolar disorder, a severe impairment, but not severe enough to meet or medically equal one of the Listed Impairments; (3)

retained the residual functioning capacity to perform unskilled work; (4) could not perform any past relevant work; and, (5) could perform work that exists in significant numbers in the national economy. Therefore, the ALJ concluded that Plaintiff was not disabled. Plaintiff appealed the ALJ's decision to the Appeals Panel which denied her request for review on May 24, 2005. Plaintiff subsequently filed the instant complaint. The parties have filed cross motions for summary judgment.

II. DISCUSSION

In reviewing the Commissioner's decision, a district court is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record. See 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate." Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999). Moreover, it is the ALJ's responsibility to resolve conflicts in evidence and to determine the credibility and weight to be afforded to the evidence. Id., 186 F.3d at 429. The ALJ's conclusions and determinations must be accepted unless there is no basis for them in the record. Torres v. Harris, 494 F.Supp. 297, 301, aff'd 659 F.2d 1071 (3d Cir. 1981). Here, critical findings of fact by the ALJ are not supported by substantial evidence in the record. Instead the substantial evidence in the record supports the ALJ's finding that Plaintiff is severely disabled, suffers from marked mental limitations, and cannot perform past relevant work. There is not substantial evidence in the record for the ALJ's determination that Plaintiff retains the residual functioning capacity to perform work existing in the national economy. In making this determination, the ALJ primarily relies upon a functional assessment report completed by Dr. Christopher King. R. at 216. Dr. King is a non-treating, non-examining consultant retained by the Commissioner only after the Commissioner's first consultant, Dr. Robert Naseef found - after examining her - that Plaintiff's limitations were sufficiently severe to preclude her from any work. Dr. King found that while Plaintiff is severely disabled and suffers from limitations, her limitations are not sufficiently marked nor extreme to preclude her from performing work.

Once the ALJ determines that Plaintiff cannot perform her past work, the Commissioner has the burden of proving that Plaintiff retains the residual functional capacity to perform some work existing in the national economy. 20 C.F.R. § 404.1520(f). Again, the ALJ determined that Plaintiff retains such a capacity. The ALJ's determination can only be made based upon the evidence of record. The evidence of record includes Plaintiff's testimony, the conflicting reports of two consulting psychologists, and the records from Hall Mercer Community Mental Health/Mental Retardation Center ("Hall Mercer). Upon careful review and consideration of the record, the court notes that Plaintiff's testimony does not provide a basis for the ALJ's determination that Plaintiff retains the residual functional capacity to perform work existing in the national economy. Plaintiff never testified to any facts that provide a basis for such a finding. Furthermore there is nothing in Dr. Robert Naseef's report which provides a basis for the ALJ's determinations. Instead, Dr. Naseef - the consulting Psychologist initially utilized by the Commissioner - concluded that Plaintiff was severely disabled, suffered from both marked and extreme limitations, and is not able to perform any work. The court recognizes that the ALJ is not obliged to accept Dr. Naseef's report as determinative of Plaintiff's limitations, however, the court notes that there is nothing in Dr. Naseef's report to indicate that Plaintiff retains the residual functional capacity to perform work existing in the national economy. Finally, after careful review, the court also notes that the records from Hall Mercer do not indicate that Plaintiff can perform work on a full work week basis .

The ALJ accepted, relied upon, and gave significant weight to the Mental Residual Functional Capacity Assessment completed by Dr. Christopher King. R. at 201. Dr. King's report concludes that Plaintiff, although severely disabled, is not so severely disabled that she cannot perform work existing in the national economy. In fact, when he completed the Mental Residual Functional Capacity Assessment, Dr. King marked the checkbox which indicated that Plaintiff is not significantly limited in "[t]he ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number

and length of rest period.” R. at 215. In explaining this finding Dr. King stated that “[Plaintiff] could be expected to complete a normal workday without exacerbation of psychological symptoms.” Id. at 216. The court first notes that Dr. King did not examine Plaintiff. Therefore, in making his conclusion, Dr. King could only have relied upon Dr. Naseef’s report and Plaintiff’s records from Hall Mercer. He did not review Plaintiff’s testimony since the hearing on her claim was held after he conducted his record review; moreover he did not have the benefit of personally examining her. Again, there is no evidence in Dr. Naseef’s report upon which Dr. King could rely in concluding that Plaintiff could perform work. There is also no evidence in Plaintiff’s records from Hall Mercer to demonstrate that Plaintiff can perform work existing in the national economy. There is nothing in Dr. Naseef’s report nor Plaintiff’s record from Hall Mercer that support a Dr. King’s conclusion that Plaintiff can work a normal workday and workweek without interruptions from her psychological symptoms. Therefore, Dr. King’s conclusion and opinion is without factual basis in the record. Dr. King’s report is the basis for the vocational expert’s determination that jobs exist in the national economy that Plaintiff is able to perform. The vocational expert’s determination and Dr. King’s conclusion provide the basis for the ALJ’s opinion. Because there is no factual basis in the record to support Dr. King’s determination that Plaintiff can work a normal workday and work week, it cannot be the basis upon which the ALJ relies . Accordingly, the ALJ cannot rely on Dr. King’s report as the basis for her opinion. The ALJ does not cite to any records from Hall Mercer, Dr. Naseef’s report, nor Plaintiff’s testimony which permits the ALJ to conclude -inferentially nor directly - that Plaintiff retains the residual functional capacity to perform work existing in the national economy.

CONCLUSION

The ALJ’s determination that Plaintiff’s mental impairments and limitations are not sufficiently severe to preclude her from gainful employment for a twelve month period or more, and also that her disability does not preclude her from performing certain work existing in the national economy is

not supported by substantial evidence in the record. Accordingly, Plaintiff's motion for summary judgment will be granted. Defendant's motion for summary judgment will be denied.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANNA MARIE MORRISON,	:	
Plaintiff,	:	
v.	:	No. 05-2744
	:	
JO ANNE B. BARNHART,	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	

ORDER

AND NOW, this 31st day of August 2006, upon consideration of the parties' cross-motions for summary judgment and oral argument **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Summary Judgment is **GRANTED**; and,
2. Defendant's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

s/ Clifford Scott Green

CLIFFORD SCOTT GREEN, S.J.